Filed 11/26/12 In re S.F. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.F., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. L.M. et al., Defendants and Appellants.	E055990 (Super.Ct.No. RIJ120307) OPINION

APPEAL from the Superior Court of Riverside County. Gary Vincent, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant L.M.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant O.F.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

O.F. (father) and L.M. (mother) appeal from the termination of their parental rights under Welfare and Institutions Code section 366.26[1] as to their child, S.F. Father contends the juvenile court erred in denying his petition under section 388. Mother raises no independent issue of her own; rather, she joins in father's opening brief. (Cal. Rules of Court, rule 8.200 (a)(5).) We find no error, and we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

In August 2010, the Department of Public Social Services (the Department) received an "immediate response referral" regarding parents' then six-month-old daughter, S.F., based on allegations of general neglect and caretaker absence. Mother, who was reportedly bipolar and paranoid schizophrenic, and S.F. did not live with father. S.F. was taken into protective custody, and the Department contacted father. Father was not involved in raising S.F. but knew of mother's mental health issues. Although father asked that S.F. be released to his care, he did not have "any provisions or basic necessities to care for a baby." On September 2, 2010, the Department filed a petition under section 300, subdivision (b), alleging that father abused substances, was not a member of S.F.'s family, and knew about mother's unresolved mental health-related issues, yet failed to intervene on the child's behalf. As to mother, it was alleged she had

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

a history with child protective services, had her parental rights to two other children terminated, and suffered from mental health issues which placed S.F. at risk.

The jurisdiction/disposition report filed on September 23, 2010, recommended removal of S.F. from the parents' custody and that reunification services be provided to father only. The court sustained the allegations in the petition on November 4. On December 10, an amended petition was filed, which changed the phrase "father abuses marijuana" to "father has a history of abusing marijuana." The court sustained the allegations in the amended petition, declared S.F. a dependent of the court, removed her from the parents' custody, and awarded reunification services to father only. Father was granted weekly visitation and ordered to engage in counseling, parenting classes, drug testing and a substance abuse program.

In the six-month review report filed on May 31, 2011, the Department recommended terminating father's services and setting a section 366.26 hearing. According to the report, father had been arrested on February 22, 2011, for violating a court order to prevent domestic violence; failure to appear; and disorderly conduct (drugs/alcohol). He was on "summary probation" and was participating in a "52 week domestic violence/batters [*sic*] program." Father's progress in completing his case was not satisfactory. He continued to test positive for controlled substances. Regarding visitation, while initially it went well, in March he went to the caregiver's home, apparently under the influence of alcohol, "screaming and yelling outside of her house demanding to see [S.F.]" By the July 21 addendum report, the Department informed the court that father's probation had been revoked after he failed to appear at a June domestic

violence progress hearing. Father's counselor informed the Department that father was highly motivated in reunifying with S.F.; however, he continued to test positive for marijuana and alcohol. The Department concluded it was "clear that [father] ha[d] not benefited from any of the services that he ha[d] been participating in."

As for mother, the social worker had lost contact with her until she called on February 22, 2011. Mother was on summary probation until February 23, 2014. She sporadically visited S.F. In April, the child's caregiver reported that mother had not visited in about a month and had not called to check on S.F.'s well-being.

The contested six-month hearing was held on July 26, 2011. Mother was not present. Father testified that he had consistently visited with S.F. and wanted more time with her. He was attending parenting classes and individual counseling. He attended a 12-step program and had not used marijuana during the 30 days prior to the hearing.

The social worker testified that father was responsive to her, despite being difficult to get in touch with. She described him as being appropriate, loving and attentive during visitation. He attended parenting classes and counseling; however, he had not completed his case plan. The social worker opined there was no substantial probability that the child would be returned to father if services were extended.

The court terminated father's services, ordered him to undergo random drug testing twice a week, and set a section 366.26 hearing. The court believed father was sincere and a "decent guy." The court also noted father had a "good rapport" with S.F. Accordingly, the judge told father that he was "keeping the door open. . . . I'm keeping visitation open and the testing on. If you miss a test or test dirty at too high a level . . .

the test ends, and visitation will go down to one time a month. [¶] . . . Give [your attorney] something to work with. He's going to come back in four months, file a motion for me to reconsider placing the child or giving you more time. . . . Sometimes it works. Sometimes it doesn't."

On October 21, 2011, father filed a section 388 petition asking the court to modify its July 26, 2011, order terminating his reunification services, reinstating reunification services, and transitioning S.F. to father's care. A hearing was set for November 22.

According to the section 366.26 report filed November 9, 2011, S.F. had been placed in a prospective adoptive home and was doing well. On August 2 and August 10, 2011, father tested positive for marijuana. He did not submit another positive test; however, two of his negative specimens were "diluted." While father consistently visited S.F., she appeared to be "quiet" and "uncomfortable" with him. Father completed his individual counseling and a parenting program. Nonetheless, the Department believed father "did not benefit from these services," as he continued to abuse alcohol and marijuana. On November 3, mother contacted the social worker and said she was "walking away" and would no longer fight for S.F. in court. The Department concluded that adoption was the appropriate permanent plan for S.F.

In an addendum report filed on November 17, 2011, the Department recommended that the court deny father's section 388 petition. It reported father had not benefited from services because he continued to remain under the influence of controlled substances through his entire participation in individual counseling and parenting education. Father had not obtained proper housing. Instead, he lived with his fiancée,

who had a criminal history. In the most recent visit with father on November 16, S.F. cried, eventually crying herself to sleep.

On January 10, 2012, mother filed a section 388 petition asking the court to vacate the section 366.26 hearing and provide her with six months of reunification services. She was participating in mental health services on her own, was consistent in attending a "WRAP" group, and had a treating psychiatrist. Mother believed she had a strong bond with S.F.

In an addendum report filed on January 24, 2012, the Department recommended denying mother's petition. Mother informed the social worker that she was enrolled in a domestic violence shelter for the next 60 days. The social worker was unable to confirm that mother was receiving any mental health services at the shelter. Mother was informed of the upcoming court hearing.

By the time of the hearing, father testified he was employed as a construction worker and could obtain his own residence if S.F. was returned to his custody. Father had three adult children in addition to S.F. and a 13-year-old son. He had completed the counseling and parenting components of his case plan. Sometimes he worked outside the county and outside the state. He had a medical marijuana license for arthritis. His recent drug test revealed a "THC level" of 44, down from 63 and 68. He was on summary probation for violating a restraining order. He was engaged in a domestic violence program. He testified that S.F. knew who he was. He criticized the social worker for trying to take S.F. away from him. In his opinion, the issues that led to the dependency arose from mother's mental health problems and not his substance abuse issues. He

gained insight into mother's condition after S.F. was removed. Mother was not present at the hearing; however, her counsel asked the court to reinstate reunification services to her.

At the conclusion of the hearing, the court denied both parent's petitions. Regarding the section 366.26 hearing, father's counsel argued the beneficial relationship exception applied and asked for a lesser permanent plan than adoption. The court acknowledged that father maintained "regular, consistent, contact" with S.F., but determined the benefit exception was inapplicable because "[t]here's no showing that the father stands in the place of a parent functionally." The court terminated the parents' rights and placed S.F. for adoption.

II. SECTION 388 PETITIONS

A parent may petition the juvenile court to change, modify, or set aside a previous order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petition must state why the requested relief is "in the best interest of the dependent child . . . ." (§ 388, subd. (b).) When the section 388 petition is filed after the denial or termination of reunification services, as in this case, "the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point, 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interest of the child. [Citation.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The parent bears the burden of proving by a preponderance of the evidence both a change in circumstances and that the change is in the child's best interest. (*Ibid.*)

We will not reverse a trial court's ruling on a section 388 petition "unless an abuse of discretion is clearly established." (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.) The scope of a court's discretion in a particular context is determined by the legal principles that govern the subject of the court's action. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) In determining whether to grant a section 388 petition, our Supreme Court has made clear that the trial court's discretion is limited only by "'the bounds of reason,'" and its determination should be disturbed on appeal only when it is """arbitrary, capricious, or patently absurd."""" (*In re Stephanie M., supra,* at pp. 318-319.)

Initially, we acknowledge father's efforts to maintain a relationship with S.F. and commend him for enrolling in, participating in, and, to a certain extent, completing the various courses, programs and counseling recommended by the Department. He consistently visited with S.F. and was always appropriate and cooperative. However, without detracting from father's efforts, we do not believe the court abused its discretion in determining father had failed to establish that circumstances have changed for purposes of section 388.

As the Department aptly notes, father was too late in entering into S.F.'s life and taking the necessary action to assume custody and care for her. He was absent for the first six months of his daughter's life. Upon being informed of the dependency action, it took him several months (at least eight months after the filing of the petition) before he initiated counseling and started a parenting class. By that time, S.F. was eight months older. Father was unable to bring S.F. into his home because he continued to depend on others for his housing. By the time of the hearing on his petition, he was living with his

fiancée, who had a criminal history that included a DUI in April 2011. At most, father merely had planned to move to another home if granted custody of his daughter. Father himself was on summary probation. He was committed to the custody of the Riverside County Sheriff for 180 days with jail time suspended under the condition that he complete a domestic violence program and 20 hours of community service.

During the period in which he received services, he continued to use marijuana and consume alcohol. While he justified his marijuana use as a means of relieving pain from his arthritis, the Department points out the fact that he had a medical marijuana card "did not mean that he was capable of parenting his child while under the influence of marijuana." We agree. Also, while father was consistent in visiting with his daughter, the visitation never reached the stage where father would care for S.F. overnight. Thus, during the period immediately prior to the hearing on the petition, S.F.'s response to father during visitation with him was described as "very resistant." She appeared quiet and seemed uncomfortable. She cried when father took her into his arms, sometimes crying herself to sleep. In contrast, she ran to the prospective adoptive parents to whom she was bonded.

Nor did the court abuse its discretion in concluding the requested change would not be in the child's best interest. As noted above, because the section 388 petition was presented at a late stage in the proceedings, there is a rebuttable presumption that continued foster care is in the best interests of the child. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The court's focus must be on the child's need for permanency and stability. (*Ibid.*) Here, at the time of the petition, S.F. had been living in the home of her

prospective adoptive parents. She was thriving in her placement, receiving love and attention, and had adjusted well to the new home. Granting father's request at this late point in the proceedings would necessarily delay the benefits of permanency and stability in S.F.'s life.

Accordingly, we reject father's argument that the court erred in denying his section 388 petition. Likewise, we reject mother's argument.

III. DISPOSITION

The orders appealed from are affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MILLER
J.